IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	No. 75491-8
	)	
v.	)	
	)	EN BANC
JACOB MELVIN KORUM,	)	
	)	
Respondent.	)	Filed August 17, 2006
_____	)	

FAIRHURST, J. – After Jacob Melvin Korum withdrew his guilty plea, the prosecuting attorney charged Korum with additional counts as promised during the plea bargaining process. The Court of Appeals dismissed the added charges for prosecutorial vindictiveness and dismissed Korum's kidnapping charges as incidental to his robbery charges. We reverse the Court of Appeals and hold that Korum failed to prove that a presumption of prosecutorial vindictiveness arose in this case. We affirm the Court of Appeals dismissal of Korum's kidnapping charges

because the State failed to properly raise the issue in this court. Thus, we reverse the Court of Appeals in part, affirm in part, and remand for resentencing consistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

Korum and four other men, Michael Bybee, Ethan Durden, Brian Mellick, and Zachary Phillips, carried out a series of home invasions during the summer of 1997, selecting drug dealers as the victims because they would be unlikely to report the crimes. The men planned to invade the homes late at night and to bind any persons they found inside to facilitate their crimes. During the fourth and final home invasion, which occurred at the Beaty/Molina home, Korum served as the driver and communicated with the others inside by walkie-talkie. The police responded to a neighbor's 911 call and arrested Mellick, Durden, and Bybee. Korum and Phillips escaped but were later arrested. Mellick offered the police information about the other home invasions in exchange for a reduced sentence, and implicated Korum in the invasions of three other homes.

The prosecuting attorney charged Korum with 16 counts of burglary, robbery, kidnapping, and assault in relation to the Beaty/Molina home invasion. In June 1998, the State and Korum entered into plea negotiations. In exchange for Korum's

guilty plea and the consequent resolution of the case, the State promised several things--two of which are pertinent to this appeal. First, the State promised to amend Korum's original 16 count information to reduce the substantive charges to allow for 15 years within the standard range plus a 5 year deadly weapon enhancement. Second, the State promised not to file additional charges for Korum's involvement in the other home invasions that it was investigating concurrently with the plea negotiations.

On July 31, 1998, in exchange for the State's promises, Korum pleaded guilty to one count of first degree kidnapping while armed with a deadly weapon and one count of second degree possession of a firearm.[1] Korum's father was present when the trial court entered Korum's guilty plea, and he heard his son admit to being the driver during the Beaty/Molina home invasions. At sentencing, Korum apologized to the Beaty family. As promised, the State recommended a sentence of 132 months, which consisted of 72 months for the kidnapping count, a 60 month firearm enhancement to run consecutively to the kidnapping sentence, and a concurrent 12 month sentence for the firearm possession count. The sentencing court imposed a

[1] All four of Korum's coconspirators also pleaded guilty to fewer charges related to the Beaty/Molina home invasion in order to obtain lesser sentences. The trial court sentenced Durden to 22 years of confinement, which was the longest sentence received by any of the participants in the home invasions.

total sentence of 135 months of confinement, followed by two years of community placement.

After pleading guilty, Korum later successfully withdrew his plea agreement when he realized that he had not been advised of a mandatory two year community placement and decided to proceed to trial. As indicated, the prosecutor filed an amended information containing 32 counts in total, consisting of the original 16 counts, the firearm possession count from the plea agreement, and 15 additional counts related to the other three home invasions. A jury convicted Korum on 30 counts, which consisted of 29 counts of burglary, robbery, kidnapping, and assault, each while armed with a deadly weapon, plus the firearm possession count. The jury acquitted Korum of one count of attempted robbery and one count of attempted burglary that duplicated other counts.

At sentencing, the State recommended that the court impose consecutive sentences and consecutive firearm enhancements on the kidnapping counts under former RCW 9.94A.400(1)(b) (1996), *recodified as* RCW 9.94A.589, resulting in a standard sentence range of 608 to 810 months, plus 600 months of firearm sentence enhancements, for a total sentence range of 1,208 to 1,410 months. The State also recommended that the court impose exceptional sentences of 1,200 months on each

of the 4 counts of burglary in the first degree and on the 2 counts of robbery in the first degree, to run concurrently with the sentences imposed on the other counts. The sentencing court imposed a sentence of 608 months plus firearm enhancements of 600 months, resulting in a total sentence of 1,208 months.

Korum appealed his convictions and sentence on numerous grounds. In a partially published opinion, the Court of Appeals dismissed Korum's kidnapping charges, counts 2, 3, 8-12, 18, 19, and 25, as incidental to the robberies. *State v. Korum*, 120 Wn. App. 686, 719, 86 P.3d 166 (2004). The court also dismissed the charges added after Korum withdrew his guilty plea, counts 17, 20-22, 24, and 26-32, on the basis of prosecutorial vindictiveness. *Id.* at 719-20. The Court of Appeals also remanded for resentencing with directions to the trial court to consider whether it should dismiss any of the remaining charges as a deterrent to prosecutorial vindictiveness under CrR 8.3(b). *Id*. at 720. The State petitioned for review, and Korum submitted a conditional cross-petition for review challenging his convictions and sentence on other grounds. We granted both petitions for review. *State v. Korum*, 152 Wn.2d 1021, 101 P.3d 108 (2004).

II. ISSUES

A. Whether this court should review the Court of Appeals reversal of Korum's

kidnapping convictions.

B. Whether the prosecuting attorney's decision to add charges after Korum withdrew his guilty plea constituted prosecutorial vindictiveness.

C. Whether the trial court should dismiss additional charges under CrR 8.3 in order to deter prosecutorial vindictiveness.

D. Whether Korum's sentence should be reversed on any other grounds.

E. Whether Korum's underlying convictions should be reversed.

III. ANALYSIS

A. The State failed to properly appeal the Court of Appeals reversal of Korum's kidnapping convictions

The Court of Appeals dismissed Korum's kidnapping charges, counts 2, 3, 8-12, 18, 19, and 25, because the kidnappings were incidental to the robberies as a matter of law. *Korum*, 120 Wn. App. at 707. The State's petition for review sets out three issues, the second of which is whether a court may "intervene in a prosecutor's selection of charges merely because some of the charges may merge at sentencing or the court believes that the possible punishment for all the alleged offenses will result in an extremely long sentence[.]"[2] State of Wash.'s Pet. for

[2] Korum maintains that the State's petition for review is untimely. This court previously rejected this argument, and we decline to consider it further.

Review (Pet. for Review) at 1. The State argues on this issue under the heading "A Court's Ability to Review a Prosecutor's Charging Decision is Extremely Limited." Pet. for Review at 12 (emphasis omitted). The State did not otherwise list the issue of whether the kidnapping charges merged in the statement of issues presented for review section of its petition for review.

In its supplemental brief, the State argues that the kidnapping charges should be reinstated because they were not incidental to the robberies or, alternatively, that if the charges do merge, the sentences should be imposed on the kidnapping counts rather than the robbery counts. Korum moves to strike the portions of the State's supplemental brief that address the merger of the kidnapping charges, arguing that the State did not properly raise the issue of whether the kidnapping charges were properly dismissed in its petition for review.

RAP 13.7(b) provides that "the Supreme Court will review only the questions raised in . . . the petition for review and the answer, unless the Supreme Court orders otherwise . . . ." *See Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 671, 63 P.3d 125 (2003) (an issue first raised in a supplemental brief is not within the scope of review). We note that the State did "raise" the merger issue in the argument section of its petition for review. Pet. for Review at 16 ("Division

II's dismissal of the kidnapping convictions, which occurred in conjunction with the robberies but involved victims other than those robbed, conflicts with this Court's *majority* opinion in *State v. Vladovic*, 99 Wn.2d [413], 420-22, 662 P.2d 853 (1983). . . . Review should be accepted to address this conflict." (footnote omitted)).

However, as noted above, the State did not list the issue of whether the kidnapping charges merged in its concise statement of issues presented for review. RAP 13.4(c)(5) directs petitioners to include "[a] concise statement of the issues presented for review." *See State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993) (holding that a petitioner had not properly raised a right to bear arms issue in his petition for review because he broached it only in his argument section, not in his petition's statement of issues as directed by RAP 13.4(c)(5)); *Clam Shacks of Am., Inc. v. Skagit County*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) (holding that "RAP 13.4(c)(5) requires a concise statement of the issues presented for review" and that RAP 13.7(b) limits review only to those issues properly raised in the petition as directed in RAP 13.4(c)(5)); *see also State v. Coria*, 146 Wn.2d 631, 655 n.9, 48 P.3d 980 (2002) (Sanders, J., dissenting) (reasoning that according to RAP 13.7(b), this court must consider issues only raised in the petition for review, and that issues are only properly raised according to RAP 13.4(c)(5) if they are in

the concise statement of issues and set forth with specificity, and it is *not* sufficient if they are only raised in the petition's argument section). We conclude that the State only referenced the merger of the kidnapping charges in its concise statement of issues presented for review in relation to prosecutorial discretion and did not clearly raise the issue of whether the kidnapping charges were incidental to the robberies. Therefore, we grant Korum's motion to strike and decline to consider the merger issue because the State did not properly "raise" the issue within the meaning of RAP 13.7(b) and 13.4(c)(5).

B. The prosecuting attorney's decision to add charges after Korum withdrew his guilty plea did not constitute prosecutorial vindictiveness

1. The prosecuting attorney had the discretion to add charges after Korum withdrew his plea agreement

Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. *See State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *see also Deal v. United States*, 508 U.S. 129, 134 n.2, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) (recognizing prosecutors have "universally available and unvoidable power *to charge or not to charge* an offense."). The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, recognizes this discretion and provides standards, not mandates, to guide prosecutors:

These standards are intended solely for the guidance of prosecutors in

> the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state.

RCW 9.94A.401. *See also* David Boerner, Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981 § 12.24, at 12-47 (1985) ("It is clear the Sentencing Guidelines Commission and the Legislature intended to prevent judicial review of [the prosecutor's charging] decisions.").

Despite this express language, the Court of Appeals held that prosecutorial discretion is statutorily limited. *See Korum,* 120 Wn. App. at 701-02. Specifically, the court relied on former RCW 9.94A.440(2)(2) and (b) (1996), *recodified as* RCW 9.94A.411(2)(a)(ii) and (B), which provide that "[t]he prosecutor should not overcharge to obtain a guilty plea," and notes that overcharging includes "[c]harging additional counts." *See Korum,* 120 Wn. App. at 701-02.

However, the Court of Appeals failed to reference relevant portions of the SRA's guidelines that support the State's decision to charge Korum with the additional counts. Whereas the language cited by the Court of Appeals is precatory, earlier language in former RCW 9.94A.440(2) provides that "[c]rimes against persons *will* be filed if sufficient admissible evidence exists."[3] (emphasis added).

[3] Contrary to the dissent's reading, we do not suggest that the prosecuting attorney "must charge all possible crimes against persons." Dissent at 5. As noted above, the prosecuting attorney has broad discretion in making charging decisions. *See Lewis*, 115 Wn.2d at 299.

All of the charges filed against Korum, with the exception of unlawful possession of a firearm in the second degree, fall under the category of crimes against persons. [4] *See* former RCW 9.94A.440(2).

Additionally, former RCW 9.94A.440(2)(1)(a) provides that other charges should be filed if they are necessary to strengthen the State's case at trial. Here, the additional charges related to crimes where Korum personally entered the invaded homes and hence was identifiable by nonparticipants in the crime. In the incident related to the original charges, Korum did not enter the homes. Thus, the State would have depended almost entirely on the testimony of Korum's accomplices. As a result, the decision to add charges after Korum withdrew his plea agreement was

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Former RCW 9.94A.440(2) provides "standards" for exercising that discretion, not mandates.

Moreover, it is important to read all of the relevant portions of former RCW 9.94A.440(2) together. Former RCW 9.94A.440(2) provides standards for deciding to prosecute "crimes against persons" (such crimes "will be filed if sufficient admissible evidence exits, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.") and for deciding to prosecute "[c]rimes against property/other crimes" (such crimes "will be filed if the admissible evidence is of such *convincing force as to make it probable* that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised." (emphasis added)). Thus, even though the decision to prosecute is entirely within the prosecuting attorney's discretion, the lower standard for prosecuting crimes against persons suggests that the legislature intended to provide even greater freedom to prosecuting attorneys in charging those crimes.

The subsequent suggestion that a "prosecutor should not overcharge to obtain a guilty plea" does not restrict the prosecuting attorney's discretion to make the decision to charge crimes against persons. Former RCW 9.94A.440(2)(2).

[4] Korum did not appeal his conviction and sentence on count 23, unlawful possession of a firearm in the second degree.

not only within the prosecuting attorney's discretion, it was also supported by the SRA guidelines and strengthened the State's case.

2. The charges added after Korum withdrew his plea agreement do not give rise to a presumption of prosecutorial vindictiveness

Constitutional due process principles prohibit prosecutorial vindictiveness. *See generally United States v. Goodwin,* 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). Prosecutorial vindictiveness occurs when "the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." *United States v. Meyer,* 810 F.2d 1242, 1245 (D.C. Cir. 1987). Thus, "a prosecutorial action is 'vindictive' only if *designed* to penalize a defendant for invoking legally protected rights." *Id.* (emphasis added).

There are two kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness. *Id*. The latter is at issue here. A presumption of vindictiveness arises when a defendant can prove that "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness." *Id.* at 1246. The prosecution may then rebut the presumption by presenting "objective evidence justifying the prosecutorial action." *Id*. at 1245.

Federal circuit courts have not conclusively decided whether a presumption of vindictiveness can even occur in a pretrial setting, as was the case here. *See*, *e.g.,*

Paradise v. CCI Warden, 136 F.3d 331, 335 (2d Cir. 1998) ("this court has consistently adhered to the principle that the 'presumption of prosecutorial vindictiveness does not exist in a pretrial setting.'" (quoting *United States v. White*, 972 F.2d 16, 19 (2d Cir. 1992)) (internal quotation marks omitted)); *United States v. Yarbough*, 55 F.3d 280, 283 (7th Cir. 1995) (the addition of six counts after the defendant successfully withdrew his plea agreement does not give rise to a presumption of vindictiveness). *But see Meyer*, 810 F.2d at 1246 (concluding that *Goodwin* did not adopt a per se rule for whether a presumption of vindictiveness may arise pretrial); *United States v. Krezdorn*, 718 F.2d 1360, 1364 (5th Cir. 1983) ("[t]he proper solution is not to be found by classifying prosecutorial decisions . . . as being made pre- or post-trial"); *United States v. Suarez*, 263 F.3d 468, 479 (6th Cir. 2001) ("prosecutorial vindictiveness can potentially be found in the pre-trial addition of charges following pre-trial assertions of protected rights." (citing *United States v. Andrews*, 633 F.2d 449, 454 (6th Cir. 1980))); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1170 (9th Cir. 1982) ("[d]epartures from the initial indictment do not raise presumptions of vindictiveness except in a rare case."); *United States v. Barner*, 441 F.3d 1310, 1317 (11th Cir. 2006) (concluding that although *Goodwin* reasoned "that aspects of the pre-trial situation make

vindictiveness less likely," that decision did not rule out "the possibility that a case could present additional factors that would make it appropriate to use the presumption in a pre-trial setting.").

Although this court has not decisively ruled on the issue, we noted in *State v. McDowell,* 102 Wn.2d 341, 344, 685 P.2d 595 (1984) that "Washington case law . . . suggests that actual vindictiveness is required to invalidate the prosecutor's adversarial decisions made prior to trial." However, we need not reach the issue of whether a presumption of vindictiveness may arise pretrial because, even assuming arguendo that a presumption of vindictiveness may arise in the pretrial context, we hold that Korum fails to establish this presumption.

In two cases, the United States Supreme Court emphatically rejected the notion that filing additional charges after a defendant refuses a guilty plea gives rise to a presumption of vindictiveness. *See Goodwin,* 457 U.S. at 377-85; *Bordenkircher v. Hayes,* 434 U.S. 357, 360-65, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). In *Bordenkircher*, the Court held that the defendant's due process rights were not violated when a prosecutor carried out an explicit threat, made during plea negotiations, to seek a habitual offender indictment if the defendant refused to plead guilty to the original charge. *Id.* at 365. Under the original charge, the prosecutor

offered to recommend a five year sentence. *Id.* at 358. The habitual offender indictment, however, would subject the defendant to a mandatory sentence of life imprisonment given his two prior felony convictions. *Id.* at 358-59. The defendant refused the plea, the prosecutor sought the habitual offender indictment, and the defendant was convicted and sentenced to life imprisonment. *Id.* at 359. The Supreme Court held that there is no violation of due process if "the accused is free to accept or reject the prosecution's offer" and "the prosecutor has probable cause to believe that the accused committed an offense defined by statute." *Id.* at 363-64.

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" -- and permissible -- "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.
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> . . . To hold that the prosecutor's desire to induce a guilty plea . . . may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself.

Id. at 364-65 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973)).

Four years later, the United States Supreme Court affirmed its *Bordenkircher*

analysis and found no presumption of prosecutorial vindictiveness arose when a prosecutor filed a more serious charge after the defendant refused to plead guilty. *Goodwin,* 457 U.S. at 377-85. "[T]he mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." *Id.* at 382-83.

Although *Bordenkircher* and *Goodwin* both involved situations where plea negotiations failed, this case is not distinguishable on the basis that Korum withdrew his guilty plea. There is no analytically relevant distinction between a defendant's failure to plead guilty and a defendant's decision to withdraw a guilty plea. The plea bargaining process encourages a defendant to forgo his trial rights in the attempt to resolve a case. A plea bargain must be knowing, intelligent, and voluntary precisely because the defendant surrenders his constitutional trial rights. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). A defendant's failure to plead guilty and a defendant's decision to withdraw a plea both amount to a failure of the plea bargaining process and return the defendant and the prosecutor to square one, at which point the defendant may exercise his right to proceed to trial. Thus, the concern over prosecutorial vindictiveness in relation to rejecting a plea and

withdrawing a plea is the same--because it interferes with a defendant's exercise of his constitutional trial rights.

Moreover, there is support for the proposition that bringing additional charges after the withdrawal of a guilty plea does not give rise to a presumption of vindictiveness. In *Yarbough*, the United States Court of Appeals for the Seventh Circuit held that Yarbough's withdrawal of his plea agreement did not increase the likelihood of prosecutorial vindictiveness. 55 F.3d at 283. Yarbough's original indictment included three charges. *Id*. at 282. The defendant then agreed to plead guilty to two of the charges but later successfully withdrew his plea. *Id*. Before trial, the prosecutor amended the indictment to include five additional charges. *Id*. The trial court denied Yarbough's motion to dismiss the amended indictment on vindictiveness grounds and the seventh circuit affirmed. *Id*. at 280-81.

Although the seventh circuit acknowledged that Yarbough's case differed from *Goodwin* and *Bordenkircher* because Yarbough had withdrawn his guilty plea rather than reject a plea agreement altogether, the court determined that the withdrawal did not change Yarbough's due process interests. *Id*. at 283. The court reasoned that "[e]ven if a defendant initially entered a plea of guilty before successfully withdrawing that plea, he still, in essence, has refused the government's

offer of a plea and has exercised his right to put the government to its proof at trial." *Id*. Similarly, the United States Court of Appeals for the Eleventh Circuit has also held that the addition of charges after the withdrawal of a guilty plea did not give rise to a presumption of vindictiveness. *Barner*, 441 F.3d at 1319. As in *Yarbough* and *Barner*, the fact that Korum withdrew his guilty plea, rather than simply rejecting a plea offer, does not alter the constitutional rights at stake and does not lend any more credence to Korum's prosecutorial vindictiveness claim. Therefore, we conclude that the mere filing of additional or more serious charges after the withdrawal of a plea agreement, without proving additional facts, does not give rise to a presumption of vindictiveness.

Korum argues, and the Court of Appeals agreed, that the following disparities are additional facts that collectively establish a presumption of vindictiveness: (1) the disparity between the State's recommendation of a 10 year sentence following Korum's guilty plea and 100 year sentence recommendation after Korum's jury trial, and (2) the disparity between Korum's 100 year sentence (and the number of counts on which Korum was tried) and the significantly lower sentence of his codefendants (who pleaded guilty to far fewer counts). *Korum*, 120 Wn. App. at 710. However, the additional facts cited by Korum to prove a presumption of vindictiveness all

stem from the prosecutor's decision to add new charges after Korum withdrew his guilty plea.[5]

Both disparities stem from Korum's 100 year sentence and, thus, are not additional facts but are, instead, the direct result of the prosecutor's decision to file additional charges. *See Barner*, 441 F.3d at 1320-21 (discrepancy between sentence under guilty plea and possible sentence at trial as well as discrepancy between sentence of defendant who withdrew his guilty plea and sentences of codefendants who pleaded guilty do not give rise to a presumption of vindictiveness). In fact, the Court of Appeals correctly noted that "[u]nderlying this exponential increase in sentencing, in part, was the State's doubling the number of charges after Korum withdrew his guilty plea and requested a trial." *Korum,* 120 Wn. App. at 711. However, neither Korum nor the Court of Appeals ever

[5] Like Korum, the dissent fails to cite a single *additional* fact that gives rise to a presumption of vindictiveness separate from the prosecuting attorney's decision to follow through on his warning to file additional charges. *See* dissent at 14. Just as the filing of additional charges alone does not give rise to a presumption of vindictiveness, neither does the result of the filing of those additional charges. Moreover, the dissent provides no support for its suggestion that "[t]he additional facts that result from or become apparent after the prosecutor's decision to file additional charges may be the very facts that establish vindictiveness." *Id*.

The dissent cites Korum's longer sentence and disparate treatment as facts indicating vindictiveness. *Id*. However, Korum necessarily received a longer sentence and disparate treatment than his codefendants because he proceeded to trial on 32 counts and the jury convicted him of 30 of those counts, while Korum's codefendants all pleaded guilty to significantly fewer counts. Neither Korum nor the dissent cites any additional fact separate from the prosecuting attorney's decision to add charges and the result of that decision, much of which was out of the prosecuting attorney's hands.

contended that the prosecutor lacked probable cause for the additional charges, or that the added charges exceeded the 16 additional charges that the prosecutor had promised to file if Korum did not plead guilty.[6] The charges added after Korum withdrew his plea agreement involved three additional home invasions in which Korum was a personal participant and that the prosecution was investigating concurrently with the plea negotiations. Clerk's Papers (CP) at 187, 1056-57.[7] We conclude that the increased number and the consequent severity of the collective charges caused the discrepancy in the sentences, not prosecutorial vindictiveness.[8]

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[6] The dissent concedes that during plea negotiations the prosecuting attorney "advised Korum that if he did not plead guilty, the State would file an amended information and charge 16 additional counts based on information about other home invasions obtained during the course of the plea negotiations." Dissent at 14-15. This fact alone indicates that the prosecuting attorney did not retaliate against Korum for withdrawing his plea, as the prosecuting attorney warned Korum that he would add the charges before Korum even agreed to the plea.

[7] The dissent asserts that "the circumstances here vary from the typical case where plea negotiations fail because the added charges in this case were not "'filed in the routine course of prosecutorial review or as a result of continuing investigation'" during ongoing plea negotiations." Dissent at 18-19 (quoting *United States v. Gamez-Orduno*, 235 F.3d 453, 463 (9th Cir. 2000) (quoting *Gallegos-Curiel,* 681 F.2d at 1169)). To the contrary, that is precisely what occurred in this case. During plea negotiations, the prosecuting attorney wrote a letter that stated, "Additionally, as the investigations have been ongoing, new charges are likely on the horizon (newly-confirmed home invasions in other cases). Obviously, if we resolve the currently charged cases, I would decline to file the new ones." CP at 187. After withdrawing his guilty plea because he was not properly advised about the mandatory two year community placement, the prosecuting attorney followed through on this warning and filed the 16 additional counts. As a result, Korum ended in the same position he would have been in had he never pleaded guilty, which is the proper result of a defendant withdrawing his guilty plea.

[8] The dissent's assertion that we "separate the strands of the entire series of events and factual circumstances and examine each fact separately" when we instead "should consider all of the facts and circumstances as a whole" is a misguided plea to ignore the facts of this case. Dissent at 9. In fact, it would be improper for us to consider the addition of 16 counts without considering what those counts reflect. The dissent obscures the fact that the 16 additional charges

We also conclude that the Court of Appeals was incorrect when it observed that "[a]lthough some significant increase in sentence recommendation is to be expected when a defendant rebuffs a plea bargain and puts the State to the risk and expense of a trial, nonetheless, this increase cannot be of a magnitude that suggests vindictive retaliation" against the defendant. *Korum*, 120 Wn. App. at 714 (footnote omitted). Based on our reading of Supreme Court precedent, the mere filing of additional charges and the consequent increase in sentence, regardless of the "magnitude," cannot support a presumption of vindictiveness without proving "additional facts."[9]

Additionally, none of the prosecutor's actions during sentencing give rise to a presumption of vindictiveness. The prosecutor asked for an exceptional sentence upward on six of the burglary counts because he believed there were bases for an exceptional sentence. 16 Report of Proceedings (RP) at 2325. The exceptional sentences would have run concurrently and would not have increased the sentence.

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involved three additional home invasions in which Korum was a more culpable participant than he was in the incidents related to the 16 original charges. Thus, we conclude that both the circumstances as a whole and a focused examination of the facts reveal that the additional charges do not give rise to a presumption of prosecutorial vindictiveness.

[9] The facts of this case illustrate why the "magnitude" of added charges and the consequent sentence does not accurately reflect whether prosecutorial vindictiveness occurred. Here, although the prosecuting attorney doubled the charges after Korum withdrew his plea agreement, those charges were related to more than double the criminal incidents.

Id. Korum received a sentence that was statutorily required and within the standard range.

Finally, the prosecuting attorney's differing characterizations of Korum's culpability during plea negotiations and at trial do not give rise to a presumption of prosecutorial vindictiveness. This discrepancy also stems from the prosecutor's decision to file additional charges. The plea agreement included only two charges stemming from one incident in which the evidence indicated that Korum was a less culpable participant. CP at 191-92, 1055-57. The additional charges included four other incidents in which Korum was a personal participant. *Id*. As a result of these additional charges, the prosecutor's changed characterization of Korum was justified and does not give rise to a presumption of vindictiveness.

Because Korum fails to distinguish *Bordenkircher* and *Goodwin* and because these cases reject the Court of Appeals' cited disparities that form a basis for finding a presumption of vindictiveness, we conclude that the collective circumstances do not give rise to such a presumption. This conclusion is consistent with the overwhelming majority of Washington Court of Appeals opinions that have addressed claims of prosecutorial vindictiveness in the pretrial setting. *See State v. Bonisisio,* 92 Wn. App. 783, 790-92, 964 P.2d 1222 (1998) (finding no

prosecutorial vindictiveness when the State charged the defendant with 10 additional counts after the defendant rejected a plea agreement); *State v. Lee,* 69 Wn. App. 31, 35-38, 847 P.2d 25 (1993) (finding no prosecutorial vindictiveness when the State increased the charge after defendant refused to plead guilty); *State v. Lass,* 55 Wn. App. 300, 306, 777 P.2d 539 (1989) (filing a more serious charge after the defendant elects to go to trial does not amount to prosecutorial vindictiveness); *State v. Fryer,* 36 Wn. App. 312, 316-17, 673 P.2d 881 (1983) (finding no prosecutorial vindictiveness when the prosecutor carried out a threat to file an additional charge against the defendant if he refused to plead guilty to two lesser charges); *State v. Serr,* 35 Wn. App. 5, 10-11, 664 P.2d 1301 (1983) (finding no prosecutorial vindictiveness when the State carried out a threat to file a habitual criminal charge against the defendant if he refused to plead guilty); *State v. Penn,* 32 Wn. App. 911, 913-14, 650 P.2d 1111 (1982) (finding no prosecutorial vindictiveness when the State filed additional charges after the defendant elected to go to trial).

The irony in the Court of Appeals approach is that instead of protecting a defendant from prosecutorial abuse, that holding only seeks to encourage it. Prosecutors would risk allegations of "prosecutorial vindictiveness" when they carry

out threats to file additional charges. To avoid this risk, as well as preserve their ability to pursue additional charges, prosecutors would be more likely to charge every available offense initially. *See Goodwin,* 457 U.S. at 379 n.10 (citing *Bordenkircher*, 434 U.S. at 368 (Blackmun, J., dissenting)). In that situation, defendants would "'bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea.'" *Id.* (quoting *Bordenkircher,* 434 U.S. at 368 (Blackmum, J., dissenting).

The facts of this case simply fail to show that the State was punishing Korum for withdrawing his plea and therefore do not raise a presumption of vindictiveness. Korum made a conscious decision to withdraw his plea and pursue his chances at trial. He made that decision with the knowledge that the State intended to file additional charges if it failed to resolve the case through a plea agreement and that he ran the risk of being convicted on all of the charges. When that proved true for 30 of the 32 charges, Korum raised a claim of prosecutorial vindictiveness at his sentencing hearing. "A claim of vindictive prosecution cannot insulate the defendant from the lawful consequences of his tactical choices." *United States v. Raymer*, 941 F.2d 1031, 1042 (10th Cir. 1991). Therefore, we reverse the Court of

Appeals and reinstate Korum's convictions on the additional charges amended to his information after he withdrew his plea.

3. The sentencing court did not err by refusing to impose an exceptional sentence downward

Although the sentencing court could have considered a downward departure in Korum's sentence under RCW 9.94A.535(1)(g), the court did not err by refusing to impose a sentence below the standard range, in consideration of the proportionality of Korum's sentence to the seriousness of his offenses and his criminal history. The language in RCW 9.94A.535 is discretionary, as it provides that "[t]he court *may* impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535 (emphasis added). RCW 9.94A.010 enumerates the purposes of the SRA, one of which is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010(1). Reading these two provisions together, it is clear that the sentencing court had the discretion to consider a downward departure in light of Korum's criminal history and the seriousness of his offenses, in addition to other mitigating factors, but that the court was in no way required to depart from the presumptive

sentence. It was within the discretion of the sentencing court to impose a sentence within the standard range.

Even though it was not required to do so, the sentencing court did consider a downward departure from Korum's presumptive sentence. 16 RP at 2329. The record indicates that the sentencing court "spent a great deal of time looking at the statutory reasons for mitigating factors for an exceptional sentence . . . ." 16 RP at 2352. The court determined that "at every court appearance, [Korum had] demonstrated that he [was] in denial about his involvement in these crimes and that he believed himself to be the victim." 16 RP at 2357. The court also noted that it could not compare the proportionality of Korum's sentence to those of the other defendants because the others pleaded guilty to far fewer counts. 16 RP at 2355. After hearing argument on the downward departure issue, in addition to statements from Korum's family, friends, and victims, the court determined there were not "substantial and compelling reasons" to justify an exceptional sentence downward and sentenced Korum to the low end of the standard range. 16 RP at 2352, 2357.

Just as the prosecuting attorney has the discretion to determine the number and severity of charges to bring against a defendant, the sentencing court has the discretion to determine whether the circumstances warrant an exceptional sentence

downward. Here, the sentencing court determined that the circumstances did not warrant an exceptional sentence downward, and we cannot say that was error.[10]

C. CrR 8.3(b) does not authorize dismissal of charges untainted by arbitrary action or governmental misconduct

In addition to dismissing the kidnapping charges and the charges added after Korum withdrew his guilty plea, the Court of Appeals remanded to the trial court to determine whether it should dismiss any of the remaining charges under CrR 8.3(b) to provide a deterrent to prosecutorial vindictiveness. CrR 8.3(b) provides that a "court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial."

The State argues that dismissal of additional charges under CrR 8.3(b) would be "unprecedented and conflicts with the opinions of this Court." Pet. for Review at

[10] The concurrence in the dissent incorrectly labels the provisions in RCW 9.94A.535 as "requirements." *See* concurrence in the dissent at 1. As noted above, the sentencing court was not required to consider an exceptional sentence downward, which is further reinforced by language preceding RCW 9.94A.535(1)(g) that states, "The following are *illustrative factors* which the court *may* consider in the exercise of its *discretion* to impose an exceptional sentence. The following are *illustrative only* and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535 (emphasis added). Additionally, the concurrence in the dissent's suggestion that the sentencing court should have made a more complete record for appellate review is immaterial, particularly when it was entirely within the court's discretion to even consider an exceptional sentence downward in the first place.

18. This court has previously determined that dismissal under CrR 8.3(b) is an extraordinary remedy and is improper unless the due process rights of the defendant are materially prejudiced. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). A trial court cannot dismiss charges under CrR 8.3(b) absent a showing of arbitrary action or governmental misconduct. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). CrR 8.3(b) "is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor." *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975).

Because we hold that Korum failed to prove prosecutorial vindictiveness and Korum has not proved the arbitrary action or governmental misconduct required for a dismissal under CrR 8.3(b), we reverse the Court of Appeals' remand for consideration of whether additional counts should be dismissed under CrR 8.3(b) based on prosecutorial vindictiveness.[11]

[11] Despite the dissent's misleading suggestion to the contrary, the only basis asserted for dismissing charges under CrR 8.3(b) *in this case* was Korum's claim of prosecutorial vindictiveness. *See* dissent at 21-23. Korum does not argue any arbitrary action or misconduct separate from his vindictiveness claim as a basis for dismissing charges under CrR 8.3(b). In fact, Korum did not even request a remedy under CrR 8.3(b) for vindictiveness--that remedy was crafted entirely by the Court of Appeals. *See Korum*, 120 Wn. App. at 719. Therefore, because we hold that Korum failed to prove his claim of prosecutorial vindictiveness, and because Korum did not allege any other arbitrary action or governmental misconduct under CrR 8.3(b), we must necessarily reverse the Court of Appeals' use of CrR 8.3 as a remedy to deter prosecutorial vindictiveness.

D. Korum's sentence should not be reversed on the other grounds he alleges

Korum asks this court to consider whether his sentence constitutes "cruel and unusual punishment,"[12] as well as any other "sentencing issues" that the Court of Appeals did not reach because its decision rendered them moot.[13] Answer to Pet. for Review and Conditional Cross-Pet. for Review (Answer) at 27. When this court reverses a decision of the Court of Appeals that did not consider all of the issues raised that might have supported the court's decision, this court must either decide those issues or remand the case to the Court of Appeals to decide the issues. RAP 13.7(b). Because we reverse the Court of Appeals dismissal of the charges added

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[12] Although Korum argued in this court and at the Court of Appeals that under the Washington Constitution his sentence amounted to "cruel and unusual" punishment, article I, section 14 refers only to "cruel" punishment. Answer to Pet. for Review and Conditional Cross-Pet. for Review (Answer) at 27; Br. of Appellant at 70-73; Wash. Const. art. I, § 14.

[13] Korum submits this court's decision in *State v. Recuenco,* 154 Wn.2d 156, 110 P.3d 188 (2005), *overruled by Washington v. Recuenco,* 2006 U.S. LEXIS 5164 (2006) as additional authority relating to the constitutionality of his sentence. In *Recuenco*, this court held that firearm sentence enhancements, similar to those imposed on Korum, violated the sixth amendment to the United States Constitution under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), if not found by a jury. *Recuenco*, 154 Wn.2d at 162. This court also held that such a Sixth Amendment violation never constitutes harmless error, a holding which the United States Supreme Court recently reversed in *Washington v. Recuenco*. *Id*. at 164; *Washington v. Recuenco*, 2006 U.S. LEXIS 5164, at *1. However, the Court left open the possibility that the Sixth Amendment violations in Recuenco's case were not harmless error under Washington law. *Washington v. Recuenco,* 2006 U.S. LEXIS 5164, at *12 & n.1.

We decided *Recuenco* on April 14, 2005, while Korum's appeal was pending with this court. However, Korum did not specifically challenge the constitutionality of his sentence under the Sixth Amendment in the lower courts, and he did not previously identify the sentencing court's imposition of firearm enhancements as error. A party may not raise an issue for the first time through a statement of additional authority. *Frank v. Fischer*, 108 Wn.2d 468, 739 P.2d 1145 (1987). As a result, we decline to reach the issue.

after Korum withdrew his plea agreement, we address Korum's two sentencing arguments that the Court of Appeals declined to reach because it dismissed those charges.

1. Korum's sentence does not amount to cruel punishment under article I, section 14 of the Washington Constitution

Korum argues that his sentence constitutes cruel punishment under the Washington Constitution. Article I, section 14 provides that "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Wash. Const. art. I, § 14. This court considers four factors in analyzing claims of cruel punishment: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980) (citing *Hart v. Coiner*, 483 F.2d 136, 140-43 (4th Cir. 1973); *State v. Gibson*, 16 Wn. App. 119, 125-26, 553 P.2d 131 (1976)).

With the exception of the firearm possession conviction, Korum's 19 remaining convictions after the dismissal of his kidnapping convictions, are all a "most serious offense," a "violent offense," and/or a crime "against persons." RCW 9.94A.030(28), (45); .411(2)(a). Under the first *Fain* factor, Korum offers no

evidence why the nature of his offenses does not support a lengthy sentence. The second factor, the legislative purpose behind the statute, is applied with caution because "[l]egislative judgments as to punishments for criminal offenses are entitled to the greatest possible deference . . . ." *Fain*, 94 Wn.2d at 401-02 n.7. Here, the overarching purpose of these statutes was to significantly increase punishment for certain multiple offenders, particularly those who were armed. Laws of 1995, ch. 129, § 1. Korum fails to prove that his sentence does not reflect this legislative purpose.

Under the third and fourth factors, Korum produced no evidence of how punishment in other jurisdictions or for other offenses in Washington compare to his sentence. Korum has not met his burden of proving that his sentence is disproportionate in light of the offenses he committed. As a result, we hold that Korum's sentence does not constitute cruel punishment under article I, section 14.

2. The consecutive sentencing provision of former RCW 9.94A.310 (1996) does not violate article II, section 19 of the Washington Constitution

Korum argues that the consecutive sentencing provisions of former RCW 9.94A.310 (1996), which was part of Initiative 159, violate the single subject rule of the Washington Constitution. Article II, section 19, the single subject rule, states

that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." Wash. Const. art. II, §19. This court addressed an article II, section 19 challenge to Initiative 159, and specifically to former RCW 9.94A.310, in *State v. Broadaway*, 133 Wn.2d 118, 120, 942 P.2d 363 (1997). We held that the legislative title of Initiative 159, "'An Act Relating to increasing penalties for armed crimes,'" was a restrictive title, and that "provisions not fairly within it will not be given force." *Id*. at 124 (quoting Laws of 1995, ch. 129), 127. We concluded that the title "carves out an area of criminal offenses, *armed* crime, and limits its scope to increasing penalties for armed crime." *Id*. at 127-28. As a result, we held that the firearm enhancement provisions were "not violative of article II, section 19, because penalty enhancements for crimes involving use of firearms fall squarely within the restrictive legislative title of Initiative 159." *Id*. at 129.

Korum contends, however, that the consecutive sentencing portion of the initiative is not one a reasonably intelligent person would conclude is within the scope of the act, noting that consecutive and concurrent sentencing are dealt with in a separate part of the SRA. Br. of Appellant at 69. He also maintains that "[s]tacking the enhancements creates an exponentially longer sentence, and is inconsistent with proportionality between the criminal offense and the extent of

punishment." *Id*. (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 253, 955 P.2d 798 (1998) (holding that former RCW 9.94A.310(3)(e) was ambiguous as to whether firearm sentencing enhancements ran consecutively to one another in addition to running consecutively to the sentences for the underlying crimes). Although other sections of the SRA cover consecutive sentencing, and this court held that former RCW 9.94A.310 may be ambiguous, these arguments alone are not sufficient to establish a violation of article II, section 19. Initiative 159 concerned increased punishments for armed crimes and consecutive sentencing for deadly weapon enhancements and is clearly within the scope of the subject and title of that act. Thus, we hold the consecutive sentencing provisions of former RCW 9.94A.310 do not violate article II, section 19.

E. No other errors warrant reversing Korum's underlying convictions

1. No violation under former CrR 3.3 (1995)

Korum asks this court to address "his CrR 3.3 argument with respect to the new charges added after his withdrawal of his plea," which the Court of Appeals declined to address because it dismissed those new charges. Answer at 27. The Court of Appeals addressed Korum's former CrR 3.3 (1995) argument with respect to his original charges and held that the state brought Korum to trial in a timely

fashion. *State v. Korum*, noted at 120 Wn. App. 686 (unpublished portion), 2004 Wash. App. LEXIS 383, at *59-60. Because we reverse the Court of Appeals dismissal of the charges added after Korum withdrew his plea agreement, we address Korum's former CrR 3.3 argument only with respect to those new charges. RAP 13.7(b).

Korum argues that the State violated former CrR 3.3, the rule governing the time for trial in criminal cases, because the same time for trial period applied to the charges added after Korum withdrew his plea agreement as applied to his original charges. Korum asserts that all of his charges arose from the "same criminal episode," and that there can be only one triggering date for calculating the time for trial. Br. of Appellant at 48-49 (citing *State v. Erickson*, 22 Wn. App. 38, 44, 587 P.2d 613 (1978)). Korum cites *State v. Peterson*, 90 Wn.2d 423, 431, 585 P.2d 66 (1978), for the proposition that the calculation of time for trial begins at the time the defendant answers any of the charges for all crimes stemming from the same criminal conduct. Br. of Appellant at 49. Korum argues that the constructive arraignment date for all of his charges should have been May 8, 2000 and that he should have been tried on the new charges on or before July 8, 2000. *Id.* at 49-50.

The State asserts that Korum's reliance on *Peterson* is misguided because

that case involved "separate charges from the same conduct." Br. of Resp't at 43 (citing *Peterson*, 90 Wn.2d at 431). In *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997), this court held that "'same conduct' for purposes of deciding what offenses are 'related offenses'" was "conduct involving a single criminal incident or episode." This court also concluded that "offenses involving separate incidents do not constitute same conduct." *Id*. at 504. As the State notes, all of the charges added after Korum withdrew his plea agreement stem from incidents separate from the original charges. Korum's original 16 charges were all related to one incident, the Beaty/Molina home invasion. With the exception of the firearm possession charge, the charges added after Korum withdrew his plea agreement were all related to the invasions of three separate homes on three different dates. As a result, it was proper for the prosecuting attorney to charge the new counts separately, and Korum was arraigned properly on the new charges on June 13, 2000.

Former CrR 3.3 provides that a defendant charged in superior court but not detained in jail must be brought to trial within 90 days after arraignment. Former CrR 3.3(c)(1). Because Korum was released on bail on December 7, 2000, the trial court had 90 days to bring him to trial. CP at 1193; former CrR 3.3(c)(1). Former CrR 3.3 also provides that continuances approved by the court or in writing shall be

excluded from the computation of time for trial. Former CrR 3.3(g)(3), (h). On July 26, 2000, 43 days after his arraignment, Korum moved to continue his trial to September 25, 2000, and signed a waiver of his right to an earlier trial. CP at 1179-80. On August 16, 2000, Korum again moved to continue his trial until October 23, 2000, and again signed a waiver of his right to an earlier trial. CP at 1183-84. On October 23, 2000, Korum agreed, pursuant to a written agreement of the parties, to continue his trial to March 31, 2001, and signed a waiver of his right to an earlier trial. CP at 1189-90.

Because the period from July 26, 2000 until March 31, 2001 was excluded from the time for trial computation, only 43 days had elapsed under former CrR 3.3 by the time Korum's trial began in March 2001. As a result, we hold that the State brought Korum to trial in a timely fashion and that there was no violation of former CrR 3.3 with respect to the charges added after Korum withdrew his plea agreement.

Korum also challenges his convictions on six other grounds. Although he failed to list those six issues in the concise statement of issues presented for review section of his conditional cross-petition, we consider those issues below because Korum provided at least some substantive argument.[14]

[14] Korum did list the following six issues under the subheading "VI. Conditional Petition

2. The trial court did not improperly admit evidence of Korum's guilty plea under ER 410

Korum argues that the trial court erred by admitting evidence of his guilty plea. ER 410 provides in relevant part that "[e]xcept as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, . . . or of any statements made in connection with, and relevant to, . . . the foregoing plea[] . . . , is not admissible in any civil or criminal proceeding against the person who made the plea . . . ." ER 410 encourages the compromise of criminal matters by allowing criminal defendants to participate in plea negotiations without fear that evidence of the plea or related statement will be used against him if he later proceeds to trial. *State v. Nowinski*, 124 Wn. App. 617, 628, 102 P.3d 840 (2004); *State v. Nelson*, 108 Wn. App. 918, 925, 33 P.3d 419 (2001).

At trial, the prosecuting attorney asked Korum's father several questions on direct regarding whether Korum told him what his involvement was in the crimes. Korum's father repeatedly answered that Korum said he was present to purchase drugs. On cross-examination, defense counsel departed from what Korum had told his father about his involvement in the crimes and asked, "Jacob *always* denied . . . involvement in the robbery, isn't that true . . .?" 9 RP at 1522 (emphasis added).

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for Cross Review" of the table of contents section of his conditional cross-petition, but he did not list the issues in his concise statement of issues presented for review. Answer at i, 2.

"He *always* has denied involvement in [the] kidnapping; isn't that true?" *Id*. (emphasis added). "Denied involvement in the assault, [the] robbery, the burglary?" *Id*. Each time, Korum's father responded affirmatively.

Following the cross-examination, the State argued that defense counsel had opened the door to the impeachment of Korum's father and requested that the trial court allow evidence, for impeachment purposes, that Korum's father had heard his son admit to involvement in the crimes. Korum's father was present when his son entered his guilty plea, and Korum's father wrote a letter on his son's behalf, requesting leniency because he did not believe his son intended to harm anyone. The trial court ruled that defense counsel had opened the door and allowed the evidence. The State proceeded to attempt to impeach Korum's father in the following exchange:

> Q. Mr. Korum, isn't it true your son had talked to you after the crime and told you that he was there, but he didn't intend for anybody to be hurt?
> A. My son told me that he was there. He saw this happen.
> . . . .
> Q. Mr. Korum, you were present at a court proceeding when he acknowledged that he was the driver at the August 30th robbery?
> A. That he had driven?
> Q. Correct. In fact, he apologized to the Beaty family; didn't he?
> A. I read the statement. He did.
> Q. You were present when he made that statement?
> A. I don't know if he was present, but I had read [the statement].

10 RP at 1728-30.

The State argues that admission of evidence of Korum's guilty plea was not error because defense counsel "opened the door" to the evidence, thus permitting the evidence to be used to impeach Korum's father. Under the invited error doctrine, a party my not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). We are persuaded that defense counsel may have opened the door to otherwise inadmissible evidence by eliciting testimony that Korum had "always" denied his involvement in the crimes.[15]

However, even if the admission of evidence of Korum's guilty plea was error, we are not convinced it constitutes reversible error. Reversal is not required "'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637

[15] The dissent's characterization that "it was the State that elicited the testimony from Korum's father that Korum had denied involvement in the crimes" is misleading. Dissent at 24. The prosecuting attorney's questions related to what Korum had told his father were substantially different from the defense attorney's questions regarding whether Korum had "always" denied involvement in the crimes. Although Korum may never have *told* his father directly that he was involved, his father was present when Korum pleaded guilty and apologized to the families involved. Thus, while the State's initial questions about what Korum told his father did not open the door to the guilty plea evidence, the defense's subsequent questions regarding whether Korum had "always" denied involvement in the crimes did open the door.

P.2d 961 (1981)). Here, the outcome of the trial was not materially affected by admission of the impeachment evidence. Among other things, Korum testified that he had been present at two of the home invasions to purchase drugs. He also admitted to joking about being involved in a third invasion. Thus, we hold that the admission of evidence of Korum's guilty plea was not reversible error.

3. The trial court did not improperly admit evidence that the authorities linked Korum with his codefendants in a police report database

Korum next challenges the trial court's decision to admit evidence that the authorities linked Korum to his codefendants through a police report database. Korum argues that the evidence should have been excluded because its probative value was substantially outweighed by the risk of unfair prejudice under ER 403.[16] Korum reasons that the evidence allowed the jury to speculate as to the reason for the connection and how extensive the contacts were, causing unfair prejudice.

The Court of Appeals considered the admissibility of the police report database evidence only under ER 404(b), which prevents the admission of prior bad acts "to show action in conformity therewith." ER 404(b). The Court of Appeals noted that at trial Korum only objected to the evidence based on foundation.

[16] ER 403 provides, in relevant part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

Korum, 2004 Wash. App. LEXIS 383 (unpublished portion), at *83-84. As a result, the Court of Appeals declined to consider the issue because it was first raised on appeal. *See* RAP 2.5(a).[17] While Korum did raise the admissibility of the police report database evidence under ER 404(b) in his pro se brief at the Court of Appeals, defense counsel also raised its admissibility under ER 403 both in the Court of Appeals and in this court. However, at trial, Korum objected only to the admissibility of the evidence based on foundation, not on ER 403, and the trial court overruled his objection. When the trial court overrules a specific objection and admits evidence, we "'will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.'" *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (quoting 5 Karl B. Tegland, Washington Practice: Evidence § 10, at 25 (2d ed. 1982) and citing ER 103). Therefore, we decline to address the admissibility of evidence of the police report database link under ER 403. RAP 2.5(a).

4. The trial court did not err by admitting evidence from a plea agreement referencing a witness' willingness to take a polygraph examination

[17] The Court of Appeals also noted that the evidence did not qualify as evidence of prior bad acts under ER 404(b) because the testimony did not specify whether Korum was a suspect, victim, or witness. *Korum*, 2004 Wash. App. LEXIS 383 (unpublished portion), at *84.

Korum did not appeal the admission of this evidence under ER 404(b) to this court.

Korum argues that the trial court erred by admitting evidence from witness Brian Mellick's plea agreement, specifically, his willingness to take a polygraph test. Mellick was one of Korum's codefendants, who participated in several of the home invasions and testified on behalf of the State at Korum's trial. Mellick pleaded guilty to his involvement in the home invasions, and the letter detailing his plea agreement explained that he would be subject to taking a polygraph to verify his truthfulness if the State so requested. In a pretrial hearing, the trial court originally decided that evidence of Mellick's plea agreement, including the letter, would not be admissible. The defense moved for reconsideration and the State and Korum eventually agreed to stipulate to the admissibility of the letter. Defense counsel stated that the State "can argue from that document, from Mr. Mellick's testimony, any doggone thing they want to argue. I'm satisfied with that. Just from the face of the document itself." 4 RP at 383-84. The court ruled that the State could cross-examine Mellick regarding his plea negotiations but that the plea documents themselves could be used only to refresh his recollection. Mellick never received a polygraph examination.

At trial, the State asked Mellick whether there was a provision in his plea agreement letter regarding how the State might verify his truthfulness and defense

counsel objected. The trial court overruled the objection, noting that the parties had stipulated to the admissibility of the terms and conditions of the plea agreement without any limitation. On appeal, the Court of Appeals held that the invited error doctrine precluded Korum from complaining about admitting evidence of Mellick's plea agreement because he had solicited the ruling that the agreement was admissible. We agree that by stipulating to the admissibility of all of the terms and conditions of the plea agreement, Korum invited the error of admitting evidence of the terms providing for verification of Mellick's truthfulness through a polygraph examination. Therefore, we reject Korum's claim of error.

5. The prosecuting attorney did not improperly vouch for the credibility of witnesses

Korum argues that the prosecuting attorney improperly vouched for some of the witnesses, constituting misconduct and depriving him of a fair trial. To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (citing *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). In order to prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury's verdict. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d

593 (1998) (citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)). If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)).

Korum contends that the prosecuting attorney vouched for Mellick's credibility by eliciting his testimony that he understood that the State would take his plea bargain away if it was not satisfied with the truthfulness of his statements. Additionally, Korum asserts that the prosecuting attorney vouched for Mellick's credibility in closing argument by referring to Mellick's promise to tell the truth or else lose the benefit of the plea bargain. This court has held that it is misconduct for a prosecutor to express a personal belief about the credibility of a witness. *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). Here, however, the prosecuting attorney did not express a personal belief about Mellick's credibility. Rather, he merely elicited evidence of Mellick's promise to tell the truth, the admissibility of which, as we noted above, was something that Korum stipulated to pretrial. Additionally,

Korum failed to object during the prosecution's closing argument, and we are not convinced that any misconduct that did occur was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson,* 132 Wn.2d at 719.

Additionally, Korum argues that the State vouched for Mellick's credibility by eliciting testimony from Detective Knutson at trial that he did not require Mellick to submit to a polygraph examination because he had verified his statements. The prosecution cannot indirectly vouch for a witness by eliciting testimony from a police officer as to the credibility of a key witness. *State v. Chavez*, 76 Wn. App. 293, 299, 884 P.2d 624 (1994). Here, Detective Knutson also did not state a personal belief about Mellick's truthfulness. Rather, he merely explained why he did not administer a polygraph examination to Mellick. Although Korum did object to the question of whether Detective Knutson ever requested that Mellick submit to a polygraph examination, the trial court overruled the objection because the prosecuting attorney had "already explored [that] area with Mr. Mellick." 10 RP at 1638. Moreover, Korum did not object to the subsequent question of why Detective Knutson did not request a polygraph examination, nor did Korum request a curative instruction. Therefore, we are also not convinced that any misconduct associated

with Detective Knutson's testimony was so prejudicial as to require reversal.

6. The prosecuting attorney did not otherwise commit misconduct

Korum alleges that the prosecuting attorney committed misconduct in three ways. We have already addressed Korum's first two allegations, that the prosecuting attorney improperly vouched for the credibility of witnesses and committed misconduct by eliciting testimony that Detective Knutson had not administered a polygraph examination to Mellick because he had verified Mellick's statements. Korum's third allegation is that the prosecuting attorney "asked numerous questions of witnesses throughout the trial that were objectionable." Answer at 24. Korum cites three passages from the prosecuting attorney's direct examination of Mellick in the effort to prove a pattern of "leading questions and questions containing hearsay." *Id*. Korum reasons that all three of his allegations of prosecutorial misconduct combined to deprive him of a fair trial.

It is Korum's burden to prove that the prosecuting attorney's questions constituted misconduct. However, Korum does not provide any substantive argument as to why the cited passages constitute misconduct, nor does he demonstrate that the alleged misconduct caused any prejudicial effect. Additionally, Korum largely failed to object to the questions he now identifies as misconduct and

did not request a curative instruction. As a result, we hold that Korum failed to prove that the prosecutor committed flagrant and ill-intentioned misconduct that resulted in enduring prejudice and an unfair trial.

7. The cumulative error doctrine is inapplicable

Finally, Korum asserts that the cumulative error doctrine requires reversal, arguing that the combined errors of the trial court bolstered Mellick's credibility while undermining Korum's credibility. Korum argues that without Mellick's testimony his convictions could not stand. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, as discussed above, Korum's claims of error are largely meritless or so minor that they do not warrant reversal. As a result, we cannot say that the combined errors warrant reversal. We hold that the cumulative error doctrine is inapplicable in this case.

IV. CONCLUSION

We decline to review the Court of Appeals holding that the kidnapping charges were incidental to the robbery charges because the State failed to properly raise the issue in this court. We reverse the Court of Appeals holding that prosecutorial vindictiveness requires dismissal of the charges the prosecuting attorney added after Korum withdrew his guilty plea. Because we hold that Korum failed to prove a presumption of prosecutorial vindictiveness or other arbitrary action or governmental misconduct, we also hold that the remaining counts should

not be dismissed under CrR 8.3(b). Finally, we find no reversible error resulting from any of the additional issues raised by Korum in his conditional cross-petition.

As a result, we affirm the Court of Appeals dismissal of counts 2, 3, 8-12, 18, 19, and 25 because the State did not properly raise the issue in this court and reverse its dismissal of counts 17-22 and 24-32 for prosecutorial vindictiveness. Therefore, as indicated by the attached appendix A, which we incorporate by reference, we uphold Korum's convictions on counts 1, 4-7, 13-17, 20-24, 26-27, and 30-32.

Thus, we affirm the Court of Appeals in part, reverse in part, and remand for resentencing consistent with this opinion.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Bobbe J. Bridge

KORUM'S CHARGES AND THEIR DISPOSITIONS			
Count No.:	**Charge:**	**Verdict:**	**Disposition:**
Count 1	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 1	Armed with a deadly weapon	Yes	Uphold
Count 2	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 2	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 3	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict , Count 3	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 4	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 4	Armed with a deadly weapon	Yes	Uphold
Count 5	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 5	Armed with a deadly weapon	Yes	Uphold
Count 6	Robbery in the first degree	Guilty	Uphold
Special Verdict, Count 6	Armed with a deadly weapon	Yes	Uphold
Count 7	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 7	Armed with a deadly weapon	Yes	Uphold
Count 8	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 8	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 9	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 9	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 10	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 10	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 11	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 11	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 12	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 12	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 13	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 13	Armed with a deadly weapon	Yes	Uphold
Count 14	Assault in the second degree	Guilty	Uphold

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Special Verdict, Count 14	Armed with a deadly weapon	Yes	Uphold
Count 15	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 15	Armed with a deadly weapon	Yes	Uphold
Count 16	Attempted robbery, 1st degree	Guilty	Uphold
Special Verdict, Count 16	Armed with a deadly weapon	Yes	Uphold
Count 17	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 17	Armed with a deadly weapon	Yes	Uphold
Count 18	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 18	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 19	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 19	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 20	Robbery in the first degree	Guilty	Uphold
Special Verdict, Count 20	Armed with a deadly weapon	Yes	Uphold
Count 21	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 21	Armed with a deadly weapon	Yes	Uphold
Count 22	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 22	Armed with a deadly weapon	Yes	Uphold
Count 23	Unlawful possession firearm, 2d degree	Guilty	Not appealed
Special Verdict, Count 23	None	N/A	N/A
Count 24	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 24	Armed with a deadly weapon	Yes	Uphold
Count 25	**Kidnapping in the first degree**	**Guilty**	**Merged**
Special Verdict, Count 25	**Armed with a deadly weapon**	**Yes**	**Merged**
Count 26	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 26	Armed with a deadly weapon	Yes	Uphold
Count 27	Attempted robbery, 1st degree	Guilty	Uphold
Special Verdict, Count 27	Armed with a deadly weapon	Yes	Uphold
Count 28	Attempted burglary, 1st degree	Not guilty	Not guilty
Special Verdict, Count 28	Armed with a deadly weapon	N/A	N/A

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Count 29	Attempted robbery, 1st degree	Not guilty	Not guilty
Special Verdict, Count 29	Armed with a deadly weapon	N/A	N/A
Count 30	Attempted assault, 2d degree	Guilty	Uphold
Special Verdict, Count 30	Armed with a deadly weapon	Yes	Uphold
Count 31	Attempted burglary, 1st degree.	Guilty	Uphold
Special Verdict, Count 31	Armed with a deadly weapon	Yes	Uphold
Count 32	Attempted robbery, 1st degree	Guilty	Uphold
Special Verdict, Count 32	Armed with a deadly weapon	Yes	Uphold

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